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## JUDGES IN THE BRITISH CABINET AND THE STRUGGLE WHICH LED TO THEIR EXCLUSION AFTER 1806

**A**MONG the anomalies in the queer and devious course of English constitutional progress few have been more striking than the number of reforms which have been due to the Conservatives.<sup>1</sup> One of no little significance was brought about during that period of political stagnation—the era of the French Revolution and the Napoleonic Wars. This was the exclusion of judges from the Cabinet, as the result of a political struggle in which the forces of opposition, though temporarily defeated, formulated a policy which was destined henceforth to prevail.

When, in 1783, Lord Mansfield declared that, “The Judges are totally independent of the minister that may happen to be and of the king himself. Their temptation is rather to the popularity of the day,” he was stating at once an achievement and a problem.<sup>2</sup> It was less than a century since the judges had been effectually freed from the grip of royal control; to what extent they were to continue involved in partisan politics was still a question. The baneful practice of consulting judges before cases reached their courts for decision,—a practice so grossly abused by the first two Stuarts<sup>3</sup>—did not survive the downfall of James II, since which time the duty of acting as legal advisers to the Crown has been generally and properly exercised by the Attorneys and Solicitors General. The appointment of judges *durante bene placito*, another very effective means of restricting their independence, though not an invariable practice, was only finally terminated by act of Parliament in 1701.<sup>4</sup>

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<sup>1</sup> Among the best known are: Catholic relief, 1829; the repeal of the Corn laws 1846; the admission of Jews to the House of Commons, 1858, and the second Reform Bill, 1867.

<sup>2</sup> STATE TRIALS, XXI, 1040.

<sup>3</sup> This practice was defended by Bacon, who maintained that: “It is a happy thing in a State when Kings and States do often consult with judges; and again when judges do often consult with the King and State: the one when there is a matter of law intervenient in matters of State; the other when there is some consideration of State intervenient in matters of law.” But he held a quaint view of the function of judges. “Let them be lions,” he declared, “but yet lions under the throne, being circumspect, that they do not check or oppose any points of sovereignty”. ESSAYS “Of Judicature,” cited in PROTHERO, STATUTES 409.

<sup>4</sup> The famous Act of Settlement, 12 & 13 William III, C. 2. For quali-

Apparently, from the time when it began to assume a distinct shape in the fourteenth century judges were appointed to the Privy Council; but the composition and functions of that body were always rather vague and elastic, and it is uncertain whether the judges were ever very generally consulted in political or administrative matters in which distinctly judicial questions were not involved.<sup>5</sup>

It was not till after the Restoration of 1660 that the Cabinet, as we know it today, began to emerge as a special committee from the old Privy Council by a gradual process which occupied the greater part of a century.<sup>6</sup> While the line of separation between the two was for some time vague and shadowy, it is clear that at least two

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fictions and previous exceptions, see an excellent article by C. H. McILWAIN, "The Tenure of English Judges," *AM. POL. SCI. REVIEW*, May, 1913, vol. VII, 217-229. Of course there were still ways of exercising government influence, such as ascertaining beforehand the views of a prospective candidate. John Holliday, for example, in his *Life of William, Earl of Mansfield, 1797*, relates a curious story showing why that hoary old jobber, the Duke of Newcastle, finally decided, against Mansfield's recommendation, not to appoint Blackstone to the Regius professorship of civil law at Oxford. Lord Campbell in his *CHIEF JUSTICES* characterizes Holliday's work as: "the worst specimen of biography in any language," yet it is valuable for its copious quotations and other contemporary matter, which Campbell himself freely uses, not always with adequate acknowledgment.

<sup>5</sup> Those interested will find the matter discussed in James F. Baldwin's learned and valuable work, *THE KING'S COUNCIL*, 1913, especially pages 21, 71, 75-78, 310, 452, 520-522. Of course judges were an essential element in the Star Chamber and were generally if not invariably included in the High Commission Courts; but these engines of oppression, as they came to be, after a period of overbearing encroachment in many areas of the common law were eventually done away with in 1641. Judges, too, were included in the Councils of Regency of Anne, George II, and George III, see 6 Anne, c. 7, sect. 9; 24 George II, c. 24; and 5 George III, c. 27, sect. 9; see *Hist. Mss. Comm. Repts.* Dropmore mss. VI, 40, 41, and Sir Samuel Romilly's diary in *ROMILLY'S ROMILLY*, II, 136-137; *ANNUAL REGISTER* for 1806, 29; *PARL. DEBATES*, VI, 262, 270, 289, 296, 297; but these contemplated temporary and special duties, and as a matter of fact, never came into practical operation.

<sup>6</sup> Much new light has recently been thrown in this process by E. R. Turner, "The Development of the Cabinet," *AM. HIST. REVIEW*, XVIII, 751-768; XIX, 27-43; "Committees of the Cabinet," *ib.* XIX, 772-793; and "The Cabinet in the Eighteenth Century," *ENG. HIST. REV.*, XXXII, 192-1917; by Sir William Anson, "The Cabinet in the XVIIth and XVIIIth Centuries", *ENG. HIST. REV.* XXIX, 56-78, 325-327, and by H. W. V. Temperly, "The Inner and Outer Cabinet and the Privy Council," *ENG. HIST. REV.* XXVII, 682-699.

eminent chief justices—to say nothing of some of lesser note—sat in the inner Council before the hotly debated appointment of 1806, which proved to be the last that has ever been made. The earlier case, that of Hardwicke, who was chief justice from 1733 to 1737, was far from certain even to those who undertook to cite it as a precedent in 1806.<sup>7</sup> Fortunately, the question was settled beyond reasonable doubt on the publication, in 1913, of Mr. Philip C. Yorke's monumental life of his ancestor.<sup>8</sup> In describing Hardwicke's activities, not only as a judge but as a statesman and as a supporter of the ministry, his most recent and authoritative biographer says:

"It would be misleading, however, to imagine that there was any such distinction in reality between his political and judicial functions. The artificial but convenient and indeed necessary separation of judicial office from political activity, maintained in modern times, was not then invented and it would have been impossible to maintain a retirement and seclusion from politics, such as is dictated by later etiquette, in our happier and more settled times.

"Modern scruples of this kind certainly never troubled Lord Hardwicke or any of his contemporaries, and, as chief justice, he continued as before to support the government with zeal and activity. He now began to take a principal share in the deliberations and decisions of the inner Cabinet,<sup>9</sup> where his opinions already had great weight, and where his attendance, in addition to his judicial duties, became exceedingly active and onerous.<sup>10</sup> On 24 February, 1737, he was made Lord Chancellor and temporarily until 8 June, 1737, he continued to hold the office of chief justice as well.<sup>11</sup> The latter was of course only an emergency arrangement;

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<sup>7</sup> Cf. *PARL. DEBATES*, VI, 269, 289, 303.

<sup>8</sup> *LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN*, 3 vols.

<sup>9</sup> Already, in the autumn of 1736, the Duke of Newcastle is writing to urge his attendance at a meeting of the ministers, and adding: "Dear Hardwicke, without you we are nothing." Yorke's *HARDWICKE*, I, 144, citing *Hardwicke mss.*

<sup>10</sup> *Ibid.* I, 143.

<sup>11</sup> *Ibid.* I, 161; *FOSS, CHIEF JUSTICES*, VIII, 190.

but apparently his more prolonged activity in the inner Cabinet excited no opposition, even if it were known at the time."<sup>12</sup>

In the case of Mansfield the outcry began before the close of his long term as chief justice; but not till 1775, ten years after he had ceased regularly to attend the meetings of the inner Cabinet. His political activity, however, commenced some years before he was appointed chief justice of the King's Bench, and he continued, as a more or less active participant in debates in the House of Lords long after his regular Cabinet connection had come to an end.<sup>13</sup> Already, as Solicitor General, he was really the Government leader in the House of Commons, though he has been accused "of professing, when it suited his purpose, entire ignorance of ministerial secrets," when, "without being formally a member of the Cabinet, it is quite clear that he was a party to its most important deliberations."<sup>14</sup> However that may be, he became a regular member of the Cabinet in 1757 and continued to sit in that body for eight years, though the fact was not generally known until he felt called upon to divulge it in 1775.<sup>15</sup> Moreover, what was naturally no secret,

<sup>12</sup> Spencer Stanhope stated in 1806: "I have heard it rumoured, that Lord Holt and Lord Hardwicke were for a short time in the Cabinet at the time they were chief justices; but I can find no proof whatever of the fact, and certainly none whatever exist of the house of commons having any knowledge thereof at the time." *PARL. DEBATES*, VI, 284.

<sup>13</sup> He was Solicitor-General, 1742-1754; Attorney-General, 1754-1756; and Chief Justice, 1756-1788. He attended the Cabinet, 1757-1765, and entered the House of Lords as Baron Mansfield 1756. He died in 1793.

<sup>14</sup> *CAMPBELL, CHIEF JUSTICES*, III, 220.

<sup>15</sup> There is further evidence besides his own admission. On 23 August, 1757 Newcastle wrote to Hardwicke: 'But as he (Hardwicke) is so often away in the country, he (Newcastle) finds himself entirely alone in the Cabinet, whenever he is of a different opinion to Mr. Pitt. Could not Lord Mansfield be called into the Cabinet to support him?' *YORKE, HARDWICKE*, III, 31. York states (*ibid.*, note 1) that this was finally effected, notwithstanding some opposition at first from Pitt, through Hardwicke's influence; he cites as authority Hardwicke mss. Moreover Yorke enumerates a number of instances of Mansfield's activity in the Cabinet, especially during the years of 1760-1761. *CAMPBELL, CHIEF JUSTICES*, III also cites *WALPOLE, MEMOIRS OF GEORGE, II*, 265, 266: "Lord Mansfield was called to the *conciliabulum*, or essence of the Council, an honour not only uncommon and due to his high abilities, but set off by his being proposed by Lord Hardwicke himself . . ."

he assumed, 9 April, 1757, for three months the office of Chancellor of the Exchequer, and it is asserted that "in this office, mainly through his mediation," the coalition between Henry Fox and Pitt was brought about.<sup>16</sup>

Mansfield himself always professed strict impartiality.<sup>17</sup> And discounting the fervor of his eulogists,<sup>18</sup> it is remarkable to what extent Mansfield, in spite of being so immersed in partisan politics, actually maintained a reputation for lack of prejudice on the bench. Nevertheless, staunch supporter as he was of strong government, and distrustful of popular sentiment, there were some at least who sharply arraigned him as a political judge.<sup>19</sup> Doubtless the most famous and most bitter was Junius.<sup>20</sup> Among those responsible for the evils of the kingdom, along with Grafton, the Prime Minister; North, the Chancellor of the Exchequer, and the two Secretaries of State, he includes Mansfield, the chief criminal judge. After charging him in general with following "a uniform plan to enlarge the powers of the crown," and scoring him in particular on points of a more or less technical character—such as introducing

<sup>16</sup> HOLLIDAY'S MANSFIELD, III, 112.

<sup>17</sup> For example, when the storm was raging over Wilkes and the Middlesex election of 1768, he declared: "The Constitution does not allow reasons of state to influence our judgment: God forbid it should! We must not regard political consequences how formidable so ever they might be. If rebellion was the certain consequence, we are bound to say *fiat justitia ruat coelum* . . . If during the King's reign I have ever supported his government and assisted his measures, I have done it without any other reward than the consciousness of doing what I thought *right*. If I have ever opposed, I have done it on the points themselves, without mixing in party or faction, and without any collateral views." HOLLIDAY, MANSFIELD, 49, 50.

<sup>18</sup> For example, Bishop Warburton, in the republication of the DIVINE LEGATION OF MOSES, who declared: "that, while every other part of the community seems to lie in *faece Romuli*, the administration of public justice in England runs as pure as where nearest to its celestial source, purer than where Plato dared to conceive it even in his feigned Republic," cited by Holliday, 142: For Holliday's own eulogistic view see, *ibid*, 53.

<sup>19</sup> Walpole says: "The occasions of the times had called him off from the principles that favored an arbitrary King—he still leaned forward an arbitrary government." MEMOIRS OF GEORGE II, II, 265, 266, cited by CAMPBELL, CHIEF JUSTICES, III, 329.

<sup>20</sup> See, e. g. his pungent observations, 21 Jan. 1769, in which he points out that "a judge under the influence of Government . . . may be a traitor to the public." LETTERS (Ed. London, 1799) I, 13-15.

"his own unsettled notions of equity," his charging juries "in ways that contradict the highest legal authorities," and "bailing men not bailable by the laws of England,"<sup>21</sup>—he continues with steadily increasing invective:

"The mischiefs you have done this country are not confined to your interpretation of the laws. You are a minister, my lord, and as such have long been consulted. Let us candidly examine what use you have made of your ministerial influence."

Among other offenses, he declares:

"You continue to support an administration which you know is universally odious, and which on some occasions you yourself speak of with contempt. You would fain be thought to take no share in government, while in reality you are the main-spring of the machine. \* \* \* Instead of acting the open, generous part, which becomes your rank and station, you merely skulk into the closet, and give your sovereign such advice as you have not spirit to avow or defend. You secretly engross the power while you decline the title of minister \* \* \*"<sup>22</sup>

Campbell, in discussing the matter nearly a century later, states that, 30 June, 1757, Lord Mansfield

"surrendered back to Mr. Legg the seals of Chancellor of the Exchequer \* \* \* but instead of returning as he ought to have done to the exclusive discharge of his judicial duties, he unhappily assumed the character of a political judge by becoming a member of the Cabinet. \* \* \* Although this arrangement was cited as a precedent when Lord Chief Justice Ellenborough was introduced into the Cabinet by a Whig Government<sup>23</sup> in the year 1806, I must express a clear opinion that it was unconstitutional and a strong hope that it will never again be attempted."<sup>24</sup>

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<sup>21</sup> LETTERS OF JUNIUS, II, 43-47, 51, 208, 243.

<sup>22</sup> LETTERS OF JUNIUS, II, 54-56; for a further attack, *ibid.*, II, 196-198.

<sup>23</sup> It was, strictly speaking, a coalition Government, and the arrangement was made to suit the Tory group led by Sidmouth.

<sup>24</sup> CAMPBELL, CHIEF JUSTICES, III, 328, 329. He states further: "All

Highly objectionable as was the practice, Lord Campbell unquestionably went too far in declaring it unconstitutional. Neither Junius nor Walpole went to such lengths,—and there were few to which the former would not go—nor did Lord Eldon in the debates of 1806.<sup>25</sup>

It was not till 1775 that the issue of Lord Mansfield's seat in the inner Cabinet was raised in Parliament. In a debate in the Lords on an "Address to the King upon the Disturbances in America," the Duke of Grafton first raised the spectre when he

"lamented the misfortune that the administration he was connected with was the only one who wanted the noble and learned lord. He was certain that some of the preceding administrations had profited by his great abilities."<sup>26</sup>

Thereupon:

"Lord Mansfield, feeling this as a direct attack, implying an interference in the public councils, endeavored to exculpate himself from the charges. He said he had been a Cabinet minister part of the late reign and the whole of the present; that there was a nominal and an efficient Cabinet; that for several years he had acted as a member of the latter, and consequently deliberated with the king's ministers; that, however, a short time previous to the time in which the noble marquis presided at the head of the treasury, and some time before the noble duke succeeded him in that department, he

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parties being now united, no opposition was made to an arrangement by which a Criminal Judge was to direct that prosecutions for treason and sedition, afterwards to come before him as judge, should be instituted, and was to preside at trials where the question would be 'whether a publication was libellous or a just animadversion on the misdeeds of himself and his colleagues?' The administration of justice under such circumstances might be pure, but could not be free from suspicion; and the objection was obvious, that remarks upon the licentiousness of the press could not be made with proper freedom and effect by a judge who, although only performing his strict duty as an expounder of the law, might be denounced as a partisan trying to screen the imbecility or wickedness of the Government." *Ibid.*, 329.

<sup>25</sup> "He utterly disowned and disclaimed every idea of the appointment being either illegal or unconstitutional," but he thought it highly inexpedient. *PARL. DEBATES*, VI, 264.

<sup>26</sup> *HANSARD, DEBATES*, XVIII, 274, Grafton's words illustrate the uncertainty which existed in those days as to who were of the inner Cabinet.



had prayed his majesty to excuse him; and from that day to the present he had declined to act as an efficient Cabinet minister."<sup>27</sup>

Later in the same debate Lord Shelburne uttered the first recorded parliamentary protest against this undesirable practice, which Hardwicke had exercised without question and to which Mansfield had only confessed under fire.

"The noble and learned Lord has confessed," said Shelburne, "that though for some years he has ceased to act in the character of an efficient Cabinet minister, there was a time when he united in his character two things in the English constitution most repugnant in their nature, that of an acting Cabinet minister and a lord chief justice of England. For my part, I always imagined, according to the true principles of this constitution, that it was the pervading principle and true excellence of it to keep the judicial and executive powers as separate and distinct as possible, so as to prevent a man from advising in one capacity what he was to execute in another."<sup>28</sup>

Mansfield made no attempt in his reply to defend his former activity as a Cabinet officer (from 1757 to 1765); indeed, his own assurance that he had for ten years ceased to act in that capacity would indicate that he, himself, had come to doubt the expediency of combining the two functions.<sup>29</sup> Yet, while condemning, as strongly as may be, this anomalous practice in which he had followed the uncommendable example of Hardwicke, one may still question whether such unpopularity as he had to face during his later years was primarily due to the Cabinet office which he had

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<sup>27</sup> HANSARD, XVIII, 274-275. This assertion he repeated later in the debate, *ibid.*, p. 279.

<sup>28</sup> HANSARD, XVIII, 281-282. It is a curious commentary on the notorious unreliability of the state of reporting in those days that Fox could declare in 1806 that: "the words are, as reported, absolute nonsense, and therefore, I am persuaded, were never uttered by Lord Shelburne." *PARL. DEBATES*, VI, 316.

<sup>29</sup> Moreover, he declined, February, 1783, to re-enter the Cabinet with the coalition ministry, though when the Great Seal was put in commission he consented to act as Speaker of the House of Lords. *CAMPBELL, CHIEF JUSTICES*, III, 424.

once held in conjunction with the chief justiceship. His support, in the House of Lords, of such unpopular measures as the coercion of the American Colonies and Catholic relief, to say nothing of his unyielding attitude, on the bench, toward the interpretation of the law of libel, are quite sufficient to account for his political enemies. However, from the middle of North's ministry he became less active as a debater in the Lords, and began to confine himself more and more to his judicial duties, in which—and it is a surprising tribute to his character—his impartiality was rarely questioned.<sup>30</sup> Nevertheless, he represented a defective system which, fortunately for the cause of judicial purity, was within a decade after his death to be vastly improved by the tacit exclusion of judges from the Cabinet.

The crisis which had this practical effect—in spite of the momentary defeat of the opponents of the administration—came with the formation of the Ministry of all the Talents in 1806.<sup>31</sup> Grenville and Fox, feeling the need of support from the Tories, asked Henry Addington, Lord Sidmouth, to join them.<sup>32</sup> Sidmouth, refusing to come in alone, either suggested Lord Chief Justice Ellenborough, a tempestuous supporter of the late Addington ministry, or else Grenville and Fox selected the Chief Justice from the Tory group. At first Ellenborough was offered the Great Seal, and upon his declining was proffered and accepted a seat in the Cabinet without portfolio and without pay.<sup>33</sup>

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<sup>30</sup> For tributes to this impartiality, see CAMPBELL, CHIEF JUSTICES, III, 419, IV, 33; for assertions made in the heat of controversy in 1806 see, PARL. DEBATES, VI, 263, 322.

<sup>31</sup> The story is told in the ANNUAL REGISTER for 1806, 27-33 and in the PARL. DEBATES, VI, 178-274, 286-331; CAMPBELL, CHIEF JUSTICES, IV, 246-252, gives a brief account, while additional light is thrown on the subject in various letters to William, VISCOUNT LOWTHER, HIST. MSS. REPT. XIII, pt. VII.

<sup>32</sup> Canning once said that Sidmouth was very like the measles, everybody had him once.

<sup>33</sup> His reasons for accepting the appointment are given in a letter of 13 February, 1806, to his brother, the Bishop of Elphin. He insisted that only a strong sense of public duty had induced him to accept a position which he had not sought. "I assure you," he writes, "that I have no motive of ambition or interest to mix in politics, and will not suffer myself to bear any part in them which can trench upon the immediate duties of my judicial situation. I am aware that I shall incur much obloquy in the hope of doing some good." CAMPBELL, CHIEF JUSTICES, IV, 247-248, quoting *Earl of Ellenborough Mss.*

The time had gone by when an arrangement of this sort could be perfected under the cover of secrecy; not only was it diligently discussed in private letters,<sup>34</sup> but "as soon as the lists of the Cabinet were published violent paragraphs appeared in the newspapers against the unconstitutional conduct of the Whigs, and notices of motion on the subject were given in both Houses of Parliament."<sup>35</sup> The attempt on the part of the opposition leaders to take advantage of the situation to defeat the appointment proved a fiasco from the standpoint of transient party strategy, and this was foreseen by a few shrewd opportunists,<sup>36</sup> but the struggle served to crystallize sentiment against an indefensible practice, with happy results for the future, results deeply gratifying particularly to the few who

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<sup>34</sup> On 4 February W. Spencer Stanhope wrote to Viscount Lowther: "Think of Lord Ellenborough, the first criminal judge, being of the Cabinet, a (word missing) and unprecedented breach of the constitution . . . HIST. MSS. COMM. REPT. XIII, pt. VII, 163.

On 11 February William Wilberforce wrote to Rev. Thomas Gisborne: "One word on a very important subject. Have you been struck by the important circumstances of the Chief Justice of the King's Bench, Lord Ellenborough, being for the time made a politician? It seems a matter of immense importance, considered in all its relations, which I need not specify to you, who are well acquainted with them all. I feel so strongly the evils that it may produce that I have been considering whether, if no one else did, I ought not to bring it before Parliament. Can a guardian *ex officio* of the constitution, be warranted in suffering such an injury as this to be sustained without trying to prevent it or giving the alarm?" THE CORRESPONDENCE OF WILLIAM WILBERFORCE, edited by sons, Robert Isaac and Samuel, Philadelphia, 1841, I, 329.

<sup>35</sup> CAMPBELL'S, CHIEF JUSTICES, IV, 248.

<sup>36</sup> For example, Lord Camden, who wrote to Lowther 25 February: "You will have seen in the newspapers that notice has been given of a motion in each House of Parliament for Monday next, by Lord Bristol in the House of Lords and by Spencer Stanhope in the House of Commons. These notices have been given without the slightest communication with any of those who are inclined to make a more moderate line and seem at once to show that it is determined by the new opposition not to wait for events which may call for observation, but to seek for them. That the appointment of Ellenborough to a seat in the cabinet is a measure I disapprove I do not deny, but to make it the matter of a specific motion strikes me as very injudicious to their own views, as the defense of the measure will closely unite Lords Grenville and Sidmouth, and plausible arguments will be given for this appointment." HIST. MSS. COMM. REPTS., XIII, pt. VII, 169.

were actuated by genuinely unpartisan motives. Lord Ellenborough himself, prudently and properly, decided not to discuss the question or to appear in Parliament during the debate; moreover, he expressed an intention, if the two positions were found incompatible, to resign from the Cabinet.<sup>37</sup>

On Monday, 24 February, the question first came up in the House of Lords for preliminary inquiry, when the Earl of Bristol asked "to be informed respecting a point which he conceived had made a deep impression on the public mind and was certainly a point of great constitutional importance."<sup>38</sup> Lord Grenville, replying for the Government, took occasion to answer various objections which had been urged against the appointment. He was "at a loss to see how" it "was unconstitutional and unprecedented."<sup>39</sup> He believed that ever since the Privy Council existed or there ever was such a station as the Lord Chief Justice he was invariably one of his majesty's Privy Council. As to the "Cabinet," under that name it was unknown to law; it was as a committee of the Privy Council that it was more frequently called upon to give advice, and "even of that committee the Lord Chief Justice had often been summoned to attend." He believed it had the sanction of the example of Lord Hardwicke, and certain he was that it had the example of Lord Mansfield.<sup>40</sup> Nevertheless, Bristol "could not help thinking the appointment highly objectionable, notwithstanding the explanation of the noble lord. To him it appeared repugnant to the consti-

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<sup>37</sup> So he wrote his brother 1 March, cited by CAMPBELL, CHIEF JUSTICES, IV, 248-249, quoting ELLENBOROUGH MSS. Convinced of the strength of his position, when Spencer Percival, the future prime minister, had written him, 23 February, urging him to reconsider his acceptance, he had replied with a very tart refusal, *ibid.*, 252-254. Although he would not discuss the question publicly, he wrote Grenville, 26 February: "I take the liberty of troubling you with reference to some instances since the Revolution in which Parliament has thought proper to confer high political trust upon persons filling the office which I unworthily hold at present." HIST. MSS. COMM. REPTS.; DROPMORE MSS., VIII, 40-41.

<sup>38</sup> PARL. DEBATES, VI, 178.

<sup>39</sup> On these two points he was right; but much in the previous and future discussion shows that there were other and grave objections.

<sup>40</sup> PARL. DEBATES, VI, 178. In the later debate he expresses the opinion that "there was nothing which should prevent a firm and upright judge from doing his duty, both as the head of the criminal judicial power and as one of his majesty's cabinet." *ibid.*, 280-281.

tution and incompatible with the due administration of justice, and on these grounds he should certainly submit it to the consideration of the House on Monday next."

Lord Mulgrave, in a letter of 25th of February to Viscount Lowther, discussed the whole issue so comprehensively and intelligently that he deserves to be quoted at length:

"Lord Bristol has given notice of a motion on Monday next on the subject of Lord Ellenborough in the Cabinet. \* \* \* I doubt whether any legal or technical imputation can be fixed upon the appointment, or rather upon the summons to council. The general principles laid down by Blackstone and Montesquieu certainly militated against it. \* \* \* There are other branches of the administration of which I should be more jealous—though this arrangement may be more calculated to arouse the national jealousy upon the unbiased administration of criminal justice. I think the individual in question to be of a coarse and violent disposition, but at the same time I do not entertain any very serious apprehension that he will in fact exercise any extraordinary injustice or tyranny on the Bench in consequence of his seat in the Cabinet. I should therefore have been as well satisfied if nothing had been said about it, unless the conduct of the Chief Justice at any future period should have rendered it necessary. I feel, nevertheless, that many strong objections in point of responsibility and coercion in Parliament present themselves. It is no unusual thing (and we have indeed a very recent instance) for Parliament to address the King to remove a minister of state, whom they think culpable as such, from his presence and councils forever. It is at the same time held by many that a judge cannot be removed from the bench but for his misconduct as judge, and yet it would be an awkward state of things to have a Chief Justice sitting in the King's presence and councils forever, for having advised an impolitic peace, or in any other ministerial measure which might have brought on him the censure of the Houses of Parliament. If in answer it is said that under such censure of the Houses of Parliament the address would be sufficient to remove him from the bench also (?), the obvious inconvenience arises of rendering the judge's tenure

of his judicial office liable to the fluctuation of political parties. \* \* \* The appointment is certainly the more objectionable as they cannot want a common law adviser in the Cabinet if the present Chancellor be good for anything.”<sup>41</sup>

Such were the preliminary skirmishings previous to the 3rd of March, 1806, when Bristol introduced his motion. In so doing he disclaimed all party views, declaring that only with reluctance had he taken the step, after he had failed to obtain his object “by private and confidential representation.” He went on to state:

“that the situation which the Lord Chief Justice now holds in the Cabinet is not only unwarranted by established usage, but in direct repugnance to those sacred and fundamental principles of policy, which alone can secure to the people of any country the pure and impartial administration of their laws.”

Although we have the examples of Hardwicke and Mansfield, it may well be questioned, he argued, whether they would throw the weight against established usage, and certainly a new idea was germinating which justified a thorough departure from these two precedents which were unfortunate relics of an older order of things. At the same time, he was aware of the lack of fixity which the position of the Cabinet had attained even at that late date.<sup>42</sup> Also, he admitted the difficulty of defining “with legal accuracy and precision the character of a responsible minister of the crown.” Nevertheless, he declared:

“Whether he (Ellenborough) be legally considered as a minister of the crown or only as an adviser of the ministers, as long as he is the associate of these ministers, and is a party to their measures and feelings, my objections to the promotion remain in full force.”

Moreover, he boldly insisted—and this must have sent a shudder

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<sup>41</sup> HIST. MSS. COMM. REPTS., XIII, pt. 7, 169-170.

<sup>42</sup> Yet notwithstanding his admitted uncertainty he drew a distinction that was coming more and more to be recognized between the Cabinet and the Privy Council, which was declining more and more into a purely formal body.

down the spines of some of the more legalistic—that, even had there been more precedents in favor of the practice than had been adduced, the question would be decided “on grounds of expediency and common safety, which are paramount to all precedents and practice”—a safety which rested on a “separation of the judicial power from the executive.”<sup>43</sup> Becoming more concrete, he suggested the possible fate of a man commenting on the Government “with that freedom which is the birthright of every inhabitant of the land we live in. \* \* \* My Lords, he would be sent to take his trial in the very court where one of the ministers whom he accused and irritated would preside not merely to direct and inform the jury but eventually in his own person to award the amount of his fine and the duration of his imprisonment.” Or, conversely, the other House might direct the Attorney General to institute a criminal proceeding against one of the ministers; whereupon the minister would be sent as a state criminal to the bar of the court where his colleague sits to judge him. Concluding his speech with a famous extract from Blackstone,<sup>44</sup> Bristol moved his resolution, stating it was the opinion of this House “that it was highly inexpedient, and tended to weaken the administration of justice, to summon to any committee or assembly of the Privy Council any of the judges of his majesty’s courts of common law.”<sup>45</sup> Supported by Lords Eldon, Boringdon, Mulgrave and Hawkesbury, and opposed by St. John, Carlisle, Carnarvon, Sidmouth, Holland and Grenville, the motion was negatived without a division.

On the same day, 3rd March, a similar resolution was moved in the Commons by Spencer Stanhope. It was supported by Canning, Castlereagh, Percival and Wilberforce, while it was opposed by Bond, Temple, Fox, Sheridan and Lord Henry Petty. The arguments for and against, which are summed up in the *ANNUAL REGISTER*,<sup>46</sup> may be sketched as follows:

I. The only clear case of a judge having held Cabinet office was

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<sup>43</sup> A separation which, and from the legislative as well, Montesquieu—whom he cites, *PARL. DEBATES*, VI, 258—had erroneously read into the English Constitution.

<sup>44</sup> *BLACKSTONE*, I, 269.

<sup>45</sup> *PARL. DEBATES*, VI, 259. For Bristol’s whole speech, see *ibid.*, pp. 253-260.

<sup>46</sup> For 1806, p. 28.

that of Lord Mansfield,<sup>47</sup> and from the effect on his character and reputation this was rather "an example to be shunned than an example to be followed. 2. It was argued, on the authority of Blackstone and Montesquieu, that it was a "fundamental maxim of free governments and a recognized principle of the English constitution" that the three functions of the government should be kept separate. 3. It was urged that Parliament had labored in vain in passing acts to secure the independence of judges if they were to be tempted by office to plunge into party politics. 4. It was held that such political activity might bias the judgment of a judge, and would certainly lay him open to the suspicion of such bias.<sup>48</sup> 5. "Much stress was laid by some members of the opposition<sup>49</sup> on a doctrine which they had collected from newspapers and pamphlets that the Cabinet, as such, is responsible for the advice given to his majesty, and consequently for the measures of the administration, and it was asked triumphantly "whether it was desirable that the Chief Justice of England should be involved in that responsibility. 'Why should his character and influence, in short all his means of doing good, be unnecessarily embarked in the frail and uncertain fate of any administration?' "<sup>50</sup>

It was answered by the supporters of the Government in opposition to the resolutions: 1. That they should not take their principles of the constitution from Blackstone and Montesquieu, but "from a study of precedents and from the practices of our fore-

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<sup>47</sup> There is no longer any doubt about the case of *Hardwicke*. See above, p. 31.

<sup>48</sup> As Lord Hawkesbury well said, a chief justice in the Cabinet "was and of necessity must be identified with those who constituted what was called the Government, in danger of becoming a party to all their passions and prejudices; and giving him, as he did, full credit for the utmost purity, it was impossible that, in questions between government and individuals, he could be considered as an unbiased judge." *PARL. DEBATES*, VI, 275-276. He admitted that the appointment was not illegal; but held "that the appointment of the chief justice of the King's Bench, of a common law judge, to a seat in the Cabinet was not congenial with the pure principles and practices of the constitution." Eldon would go no further than to say that it was inadvisable and inexpedient. *ANN. REG.*, 28, 29.

<sup>49</sup> *i. e.*, Those who, against the administration, favored the motion to exclude.

<sup>50</sup> The last quotation is from *Castlereagh*, *PARL. DEBATES*, VI, 330.



fathers.”<sup>51</sup> It was “idle to talk of the separation of the legislative, executive and judicial powers \* \* \* where one of the branches of the legislature was the supreme court of law and had usually for its speaker the first officer of the kingdom;<sup>52</sup> where the servants of the crown sat in both Houses of Parliament, and where the chief justices were privy councillors and sworn advisers of the Crown.”<sup>53</sup>

3. It was contended that from the very earliest period “the judges had been employed and consulted by the Crown in the executive department of the state. Moreover, various instances were cited where chief justices had been especially named as members of councils to advise the King, or, in cases of absence or minority, to share as regents in administering the government. But all except two of the former dated from the days before responsible and party government and the birth of the modern Cabinet, while the cases of bills of regency under Anne and the Georges were for special emergencies. When the government supporters went so far as to refuse to admit that Mansfield, because of his political activities, “had become unpopular as a judge,” they were certainly stepping upon debatable ground.”<sup>54</sup>

So much for the general arguments; it now remains only to con-

<sup>51</sup> Lord St. John, *PARL. DEBATES*, VI, 261. Lord Carnarvon voiced the same idea: “They must not take mere theories of writers against the inviolable practice of Government.” *Ibid.*, 274. The Lord Chancellor declared: “The scenes which had been exhibited on the Continent afforded a terrible example of the mischief which was likely to result from any attempts to introduce reform founded on theory and speculation. It was the peculiar advantage of the British Constitution that it had been formed gradually, that it was the creature of time and circumstances, not the offspring of any theory.” *Ibid.*, 281-283.

<sup>52</sup> But the Chancellor was recognized as a political officer whose tenure was dependent on the administration who chose him, while the common law judges who might display strong party feeling in a Cabinet were on the bench for life unless guilty of gross immorality or incompetence. For a discussion of the differences between the Chancellor and the judges, see *PARL. DEBATES*, VI, 255, 289, 324-326.

<sup>53</sup> As a matter of fact, they had usually been consulted on points of law, and a privy councillor occasionally consulted was quite different from an active member of the Cabinet.

<sup>54</sup> See above, p. 31. Lord Eldon said: “It must also be recollected how extremely unpopular that noble and eminent person became after he had united those stations, and how that unpopularity clung to him for the greater part of his life.” *PARL. DEBATES*, VI, 263.

sider a few of the particular contributions to the debate. In the House of Lords, Sidmouth was naturally stalwart in support of his candidate, insisting that the Government needed the abilities and assistance of Ellenborough. To object to the admission of a chief justice to the Cabinet would "fetter the legitimate prerogative of the crown, limit the sphere of public duty and the means which his majesty possessed of calling for the advice of distinguished ability in his Privy Council." Further, he aimed to show, what had ceased to be the case, that the aims of privy councillor and a cabinet minister were not very different. As political supporter Ellenborough may have been necessary to Sidmouth; as a legal adviser, with the Chancellor and the Attorney and Solicitor Generals he was unnecessary to the Government.<sup>55</sup>

Spencer Stanhope in introducing his resolution into the House of Commons made some telling points, not all of which, however, were new. For a judge to hold a seat in the executive council, he maintained, was a breach of the spirit of the law made at the beginning of the reign of George III relating to the independence of the judges.<sup>56</sup> He, too, emphasized the point that "judges should not only be above all bias but above all suspicion of bias." Considering precedents, he stated that while he had heard it rumored that Lord Holt and Lord Hardwicke were for a short time in the Cabinet during the period when they were chief justices, he could "find no proof whatever of the fact,"<sup>57</sup> and certainly none whatever exist of the House of Commons having any knowledge thereof at the time." Admitting the precedent of Mansfield, he brought out the fact that it was not known in Parliament "until ten years after he had withdrawn from that situation" and until it had been "charged upon him" by Shelburne.<sup>58</sup>

He concluded by introducing his resolutions:

"First, that it is the opinion of this House that it is highly expedient that the functions of a minister of state and of a confidential adviser of the executive measures of government should be kept distinct and separate from those of a

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<sup>55</sup> Lord Mulgrave pointed this out. *PARL. DEBATES*, VI, 272-274. For Sidmouth's speech, see *ibid.*, 267-272.

<sup>56</sup> 1760. 1 George III, c. 13.

<sup>57</sup> In the case of Hardwicke, of course, he was in error.

<sup>58</sup> *PARL. DEBATES*, VI, 286-291.

judge at common law. Second, that it is the opinion of this House that those members of his majesty's most honorable Privy Council, whom his majesty is advised to direct to be habitually summoned, and who are so summoned to that committee or selection of the said council which deliberates upon matters of state, and which is commonly known by the name of the Cabinet Council, are and are deemed to be the confidential ministers and advisers of the executive measures of government. Third, that the so summoning to the said committee, or Cabinet Council, a lord chief justice to sit and deliberate as a member of the same is a practice peculiarly inexpedient and inadvisable, tending to expose to suspicion and to bring into disrepute the independence and impartiality of the judicial character, and to render less satisfactory, if not less pure, the administration of public justice."<sup>59</sup>

It was moved as an amendment by a supporter of the Government "that the orders of the day be now read."<sup>60</sup>

Canning, who spoke in favor of the motion, rather elaborately rebutted the assertion of the other side "that Lord Mansfield held both situations and no notice had been taken of it by Parliament, although the thing must have been notorious." He contended that "though positive evidence could not be had on this subject," nevertheless, circumstantial evidence showed very strongly "that this thing was not generally known. There were surmises about it, and as often as it was alluded to it was marked with reprobation."<sup>61</sup>

Charles James Fox, as a leading member of the Ministry of all the Talents, made a long speech in behalf of the Chief Justice, but, as in his two historic fights against Pitt in 1783-84 and 1788-89, he was inconsistent with his principles and failed to rise to the occasion. So he managed to deliver himself of an adroit piece of special pleading rather than to present a sound, convincing argument.

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<sup>59</sup> *PARL. DEBATES*, VI, 291.

<sup>60</sup> *Ibid.*, 298.

<sup>61</sup> That is, of course, previous to the exposé of 1775. Regarding Mansfield's own attitude, he remarks: "You had the example of his maturer judgment against that of his earlier years; for, by refusing to act as a Cabinet minister after 1775 he in some measure tacitly condemned his former conduct." *PARL. DEBATES*, VI, 298-305.

Particularly specious for one of his progressive views was his contention that the Cabinet Council was a body unknown to law, a body that Parliament declines to recognize as apart from the Privy Council. Further, he continued, it was a mistake to suppose that the Cabinet as such was responsible for the measures of the Government. "It would be difficult to point out in our statutes or in the recorded proceedings of Parliament evidence that the Cabinet or any individual belonging to it had been, as such, held legally responsible." Every minister, he asserted, was separately responsible in his own department of the government; but "no man nor body of men could be made responsible for the whole acts of an administration."<sup>62</sup> In other words, he held that Ellenborough could be no more responsible for the acts of his colleagues as a Cabinet officer than as a privy councillor. Wittingly or unwittingly, Fox omitted to distinguish, and his admiring commentator in the *ANNUAL REGISTER*<sup>63</sup> failed to detect that he did not distinguish between legal responsibility punished by impeachment and political responsibility resulting in simultaneous resignation or an appeal to the country. Sheridan spoke on the same side with even less evidence and weight.<sup>64</sup>

Strangely enough, in upholding the independence and purity of the judiciary, the most comprehensive and convincing speech seems to have been made by Castlereagh, whom Tom Moore<sup>65</sup> and many others regarded as fair game on account of his absolutism, his tendency to mix metaphors, and his supposed inability to frame a

<sup>62</sup> *PARL. DEBATES*, VI, 308, 319.

<sup>63</sup> He referred to "the solid and irresistible arguments by which Mr. Fox confuted and brought to disgrace the flimsy and superficial hypotheses of the Cabinet Council, as such, responsible for the measures of the administration." p. 32.

<sup>64</sup> *PARL. DEBATES*, VI, 335-337. Yet Lord Chancellor Erskine could report in a letter to Ellenborough that he had heard that "in the Commons Fox and Sheridan were most admirable." He went on to say that: "In our house everything was in your honor; and indeed, though there was a great deal of excellent speaking, there was no debate; at least nothing which could be called so, because, after their batteries had been completely silenced, they were under the fire of Lord Holland and Lord Grenville for near two hours, so that before I put the question I had only to say that the objection was dead and buried." *CAMPBELL, CHIEF JUSTICES*, IV, 250.

<sup>65</sup> *e. g.*, in "The Fudge Family in Paris," letters to Castlereagh, *WORKS*, II (British Poets, ed. Boston, 1856), pp. 288, 338. See also:

coherent sentence. With reference to the precedent of Mansfield in the Cabinet, he declared:

"No judge of more comprehensive knowledge or more splendid talents ever sat upon the Bench, yet no one ever possessed in a less degree the confidence of the public. He was regarded with jealousy (perhaps unjustly so) as carrying his political feelings with him into court, and was never able to conquer the effects of having so intimately connected himself with the politics and the party of his day. There is every reason to believe that Lord Mansfield was himself deeply impressed with the sense of his own indiscretion, in having become a member of the Cabinet. He certainly declined to return to it after 1765, and is said to have lamented to the last hours of his life that he had ever suffered himself to be placed in this anomalous and hazardous predicament."

Grappling with the question as to why justices should be in the House of Lords and the Privy Council, if not in the Cabinet, he pointed out that the former, among other things, was a judicial body and a court of appeals, and so "necessarily requires the presence of legal characters," since otherwise too much would devolve on the Chancellor.<sup>66</sup> As to the latter, the Privy Council, he asserted very properly that:

"the greater part of the business which comes before that Council is of a judicial nature; and it is therefore necessary that persons of legal knowledge and experience should habitually attend upon that body. Every privy councillor is bound, of course, to afford his advice to his sovereign upon all subjects upon which his majesty may think fit to call for it. On many points usually discussed in the Cabinet and not in the

Question: Why is a pump like Viscount Castlereagh?

Answer: Because it is a slender thing of wood,

That up and down its awkward arm doth sway,

And coolly spouts and spouts and spouts away,

In one weak, washy, everlasting flood! *Ibid.*, 234.

<sup>66</sup> Other peers of legal experience were supposed to assist, but it was never certain how many such there might be at any particular time. The creation of four law lords by the legislation of 1873-1876 has rendered the old arrangement unnecessary.

Council at large, the assistance of the Chief Justice may be highly necessary, and to such occasional recurrence to them for advice we do not object. But it does not follow from the right of the King to call upon every individual privy councillor for advice as often as he shall see occasion, and from the obligation imposed upon such privy councillor by his oath to advise when called upon, that it is an expedient or a constitutional (sic!) exercise of the prerogative to summon a person exercising judicial function, who is made a privy councillor that he may be resorted to for occasional assistance on subjects of a special nature, to all the secret deliberations on state affairs, without any consideration for the purpose for which he was chiefly invested with the character of a privy councillor; and it cannot therefore be contended that the circumstance of a Chief Justice being a member of the Privy Council proves the fitness of his having a seat in the Cabinet."

He then proceeds to consider the many and obvious inconveniences which may arise from a justice being a permanent member of the Government:

"Many cases are likely to come before him judicially of a description which must compel him either to abdicate his functions on the bench, and to leave to others the discharge of a duty which it belongs to himself to perform, or he must act under all the suspicion and be exposed to all the jealousy which attaches to parties in the cause. Libels on the government of which he forms a part; prosecutions against a colleague for malversation; trials of state offenses, or questions connected with the construction of statutes in which the administration of the day take an interest must all place a political chief justice in a difficult dilemma; he must either deprive the country of the advantage of having justice administered by the highest authority, or of having it dispensed by a person who is necessarily open to vulgar, if not rational, suspicion."

Coming to Fox's assertion that the Cabinet Council was a body unknown to the law or the constitution and had never been recognized by Parliament, he took the very justifiable ground that it

was "as well known to Parliament as if the existence of such a Council had been the subject of express legislative enactment."<sup>67</sup> Moreover, he strenuously contradicted Fox's further assertion that there was not collective as well as individual responsibility in the Cabinet Council.

"The right honorable gentleman has admitted that any privy councillor is liable to answer for the advice which he may give to the Crown; but he cannot by any such admission exempt those privy councillors who are avowedly selected habitually to advise his majesty on the current affairs of his government from the general responsibility which results from being charged with the duty of giving that advice constantly and systematically, which other privy councillors are in the habit of giving only occasionally, if at all."

Then with pointed emphasis he added:

"Independently, however, of the application of the right honorable gentleman's argument to the present question, it is of no small importance that the country at large and that Europe should be informed whether the Cabinet Council generally, with the noble lord (Grenville) at its head, is to be considered responsible for all the measures of the Government or whether those alone who carry into execution the respective acts are answerable."

In an effective summing up of his argument against Fox, Castle-reagh declared:

"If the right honorable gentleman has failed in divesting Lord Ellenborough of the responsible character of a minister, summoned as he is acknowledged to be habitually and not occasionally to the deliberations of the Cabinet; if he has failed to disprove the obvious inconveniences, to say the least of such an union of incompatible functions, in the same person, which must compel him to abandon his duty either as a

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<sup>67</sup> Also, he bluntly declared: "However it may suit the purpose of his present argument, I apprehend the right honorable gentleman would have been very little disposed, when he himself was out of office, to listen with patience to such a statement from any minister of the Crown." *PARL. DEBATES*, VI, 326.

minister or as judge; if he has failed to produce either from precedent or analogy any adequate arguments to sustain a practice so obviously injurious; as little has he succeeded in establishing any sufficient ground either of expediency or necessity to justify, in the instance immediately before us, the adoption of a measure which is open on general principles to the strongest objections.<sup>68</sup>

Although opposition to the Administration naturally influenced Castlereagh and his colleagues to a considerable extent, they made a fervent and lofty appeal for the necessity of preserving the judges from all connection and from all suspicion of connection with partisan politics.<sup>69</sup> Nevertheless, the vote in the Commons was 222 to 64 for the amendment on the orders of the day against the resolution, a result due rather to inferiority of party strength<sup>70</sup> than to any want of soundness or justness in their position. Lord Campbell, who wrote half a century after the debate of 1806, declared that "the argument was all on the losing side." Yet, while this is in general true, he undoubtedly went too far in asserting that the practice which they condemned was unconstitutional.<sup>71</sup>

In regard to another issue which played an important part in the discussion he was undoubtedly right. Admitting that the letter of

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<sup>68</sup> For Castlereagh's whole speech, see *PARL. DEBATES*, VI, 319-332.

<sup>69</sup> One extract may suffice to convey an idea of Castlereagh's compelling, if somewhat involved, eloquence on this theme: "Can the right honorable gentleman," he demanded, "contemplate the judicial system of the country; can he advert to the wise principles on which it has been framed and improved; the care that has been taken to render the situation of a judge not only independent of every influence, and especially of that of the Crown, but to consider them as a distinct order in the community, to which the nation might look up with unlimited confidence as solely and entirely devoted to the administration of justice and removed from the cabals or political struggles of the times? Can he thus contemplate the dignified and useful situation of a judge acting within his proper sphere, and deem it either of slight importance or of little danger to call upon a chief justice to descend from such an eminence for the purpose of involving himself in the confusion and vicissitudes of political life?" *PARL. DEBATES*, 329.

<sup>70</sup> There is an interesting letter from Charles Long to Viscount Lowther, 13 March, 1806, expressing the opinion that, as a piece of party strategy, the opposition were unwise in forcing the issue and seeking a division when they did. *HIST. MSS. COMM. REPTS.*, XIII, pt. VII, 177.

<sup>71</sup> See p. 29.



the law did not recognize the Cabinet as distinguished from the Privy Council, he goes on to insist very emphatically, "but in the practical working the Cabinet has long been known as a separate defined body in whom, under the Sovereign, the executive of the country is vested. \* \* \* To say, therefore, that whoever may without impropriety be sworn of the Privy Council may without impropriety be introduced into the Cabinet is a mere quibble unworthy of Mr. Fox and Lord Grenville."<sup>72</sup> Nevertheless, he fails to take account of the fact that not only Government men in the heat of debate but Lord Auckland in a private letter,<sup>73</sup> also the writer of the account in the *ANNUAL REGISTER*,<sup>74</sup> and even the great criminal law reformer, Sir Samuel Romilly, sincerely, if mistakenly, held the view of the Cabinet defined by the leaders of the Ministry of all the Talents.<sup>75</sup>

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<sup>72</sup> *CHIEF JUSTICES*, IV, 250-251.

<sup>73</sup> To Lord Grenville, 10 February, 1806. "I understand," he says, "that \* \* \* one of the first attacks is to be on the admission of Lord Ellenborough into the Cabinet, which is pretended to be unconstitutional and injurious to his judicial character. \* \* \* But the whole is founded in ignorance of the meaning of 'Cabinet,' which is only an occasional committee of the Privy Council, to which Privy Council all chief justices have belonged." *HIST. MSS. COMM. REPTS., DROMORE MSS.*, VII, 26.

<sup>74</sup> "On the whole," he reports of the debate of 1806, "it was satisfactorily made out on the side of the ministry that the Cabinet, as such, is not responsible for the measures of government, that no individual minister is responsible for more than his own acts and such advice as he is proved to have already given; that a Cabinet counsellor performs no duties and incurs no responsibilities to which as a privy counsellor he is not liable; that the judges of England are not intended by the constitution of their country to be such insulated beings as speculative writers represent them; that the nomination of Lord Ellenborough to a place in the Cabinet was not only strictly legal but justifiable on the grounds of precedent and constitutional analogy; that the tendency and effect of his appointment had been misunderstood in many particulars by the supporters of the motions before Parliament. Pp. 32-33.

<sup>75</sup> He noted in his diary, 1 March, 1806: "At Mr. Fox's request I attended a meeting of several of the House of Commons, to consider the question, expected to be brought on in the House \* \* \* on the subject of Lord Ellenborough having a voice in the Cabinet. That there is nothing illegal or unconstitutional in this seems clear. It is certainly very desirable that a judge should not take any part in politics, but this is not according to the theory of our constitution, nor inconsistent with practice in the best times in our history. The chiefs of all three courts are always privy councillors; and the Cabinet is only a committee of the Privy Council, and, as a Cabinet, is

Apparently, opinion outside the walls of Parliament was from the first on the side of the temporarily defeated party. The writer in the *ANNUAL REGISTER*, though favorable to the Government side of the question, honestly records:

"But the public could not but perceive the difference between the actual duties of a privy counsellor's and those of a Cabinet counsellor's place; between the occasional and habitual exercise of the same functions; between the right of taking a part in the political discussions of the day and the necessity of giving an opinion on all state affairs as they arise; and they who reflected on the slow and beneficial progress by which judges had been detached from state intrigues and removed out of the pernicious atmosphere of the court could not but regret that the stream had taken a retrograde direction, and threatened to fall into that gulph where so many judges had perished in former times."<sup>76</sup>

As a matter of fact, the effect of the opposition attack was seen before the Ministry of all the Talents had run its short course. According to the Lord Campbell:

"The resolution to keep Lord Chief Justice Ellenborough in the Cabinet gave a dangerous shake to the new Government,<sup>77</sup> and public opinion being so strong against it, the advantage expected from it was not enjoyed, for, from dread of injuring his judicial reputation, he took little part in debate, and remained silent on occasions when, professing to be an independent peer, he might legitimately have rendered powerful help to the Government. It is said that Lord

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unknown to the Constitution." *MEMOIRS OF THE LIFE OF SIR SAMUEL ROMILLY*, edited by his son [ed. 1840], II, 136-37.

<sup>76</sup> *ANNUAL REGISTER*, 33.

<sup>77</sup> The personal feeling against the "political chief justice" in certain quarters is well reflected in a letter from Viscount Melville to Viscount Lowther, 17 August, 1806: "The more one thinks of it, the more astonished must he be at the absurdity and impropriety of placing Lord Ellenborough in the Cabinet. If it had been customary to admit other chief justices into the Cabinet, the character, temper and vulgarity of his lordship would have afforded good reason for making him an exception from a general rule, but to select a person for the situation against whom there lay so many objections is quite inexplicable." *HIST. MSS. REPTS.*, XIII, pt. VII, 198.

Ellenborough himself ere long changed his opinion, and to his intimate friends expressed deep regret that he had ever been prevailed upon to enter the Cabinet."<sup>78</sup>

Never again was a chief justice appointed to a seat in the Cabinet.<sup>79</sup> With precedents of such outstanding figures as Hardwicke, Mansfield and Ellenborough, the practice thus checked might easily have hardened into a fixed custom, to the manifest detriment of the independence and influence of the judiciary. The frustrating of this unfortunate eventuality, as well as the clarifying of current hazy notions as to the true status of the Cabinet Council, were due to the opposition of 1806, in which, curiously enough, the arch reactionary of his generation took a leading part.<sup>80</sup>

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ARTHUR LYON CROSS.

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<sup>78</sup> CHIEF JUSTICES, IV, 251-252.

<sup>79</sup> Lord Campbell had a seat in the first Russell ministry from 1846 to 1850 as Chancellor of the Duchy of Lancaster. He was appointed chief justice 6 March, 1850. "On assuming his office he of course relinquished his seat in the Cabinet Council, as he had expressed his disapproval of the union of the two positions by Lord Mansfield in 1757 and Lord Ellenborough in 1806." FOSS, *THE JUDGES OF ENGLAND*, IX, 165.

<sup>80</sup> Castlereagh's part in the debates of 1806 should contribute toward the recent tendency to modify the distorted view of his character and abilities which so long prevailed.